(5)

No. 93-1170

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

JOHN C. HOYLE
ALFRED MOLLIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

51pp

QUESTIONS PRESENTED

Section 501(b) of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 501(b) (Supp. IV 1992), prohibits the receipt of payment for appearances, speeches, or articles by Members of Congress and by employees and officers in all three branches of government. The questions presented are:

1. Whether Section 501(b) violates the First Amendment rights of employees in the Executive Branch by prohibiting honoraria when neither the expression nor the payor has a nexus to federal employment.

2. Whether, if Section 501(b) does infringe the First Amendment to that extent, the court of appeals erred in invalidating Section 501(b) as applied to all honoraria received by Executive Branch employees, rather than invalidating it only as applied to cases where neither the expression nor the payor has a nexus to federal employment.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the United States, the Office of Government Ethics, the Attorney General, the Director of the Office of Government Ethics, the National Treasury Employees Union, Jan Adams Grant, Thomas C. Fishell,* the American Federation of Government Employees, David E. Hubler, Peter G. Crane, Richard Deutsch, William H. Feyer, Judith L. Hanna, George J. Jackson, Eduard Mark, Arnold A. Putnam, Charles E. Fager, and Robert A. Gordon. The district court also certified a class representing all employees in the Executive Branch below the grade of GS-16.

* Mr. Fishell, who was a respondent when the petition was filed, has left federal employment, and the writ of certiorari has been dismissed with respect to him pursuant to Sup. Ct. R. 46.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1170

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-58a, is reported at 990 F.2d 1271. The opinions filed on the denial of rehearing en banc, Pet. App. 80a-107a, are reported at 3 F.3d 1555. The opinion of the district court, Pet. App. 59a-78a, is reported at 788 F. Supp. 4. An opinion of the court of appeals affirming the denial of a preliminary injunction is reported at 927 F.2d 1253.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1993. A petition for rehearing was denied on September 21, 1993. On December 10, 1993, the Chief Justice extended the time within which to

file a petition for a writ of certiorari to and including January 19, 1994, and the petition was filed on that date. The Court granted the petition on April 18, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech." The relevant portion of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 501 *et seq.* (Supp. IV 1992), is set forth in the appendix to the petition. Pet. App. 108a-113a. The relevant regulations implementing that Act are set forth in the appendix to the petition. Pet. App. 114a-134a.

STATEMENT

A. The Background And Enactment Of The Honorarium Ban

1. Congress has long placed restraints on the ability of federal employees to accept honoraria for appearances, speeches, and articles. In 1974, Congress prohibited any "elected or appointed officer or employee of any branch of the Federal Government" from accepting any honorarium of more than $1,000 (excluding expenses) for any "appearance, speech, or article," or from accepting more than $15,000 in total honoraria payments during any calendar year.[1] In 1976, Congress raised those limits to $2,000 per

[1] Pub. L. No. 93-443, § 101(f)(1), 88 Stat. 1268 (1974), formerly codified at 18 U.S.C. 616 (Supp. IV 1974) (repealed).

appearance, speech, or article and to $25,000 per year.[2] Later, Congress removed the $25,000 limitation, but then capped the annual receipt of honoraria for Members of Congress at 30%, and then 40%, of the Members' salaries.[3] None of those provisions was limited to honoraria received for expressive activities that were related to the speaker's federal employment; rather, all of them extended also to expressive activities that bore no such relation.

These provisions failed to eliminate concerns about the propriety of honoraria payments.[4] In the late 1980s, two blue-ribbon commissions expressed the view that the existing limits on the receipt of honoraria were inadequate.[5] The commissions noted that receipt of honoraria by Members of Congress had created an appearance of impropriety and had undermined the public's confidence in the integrity of public officials. The report of the Quadrennial Commission concluded that "[t]he potential for abuse or the appearance of abuse is obvious to the public" and

[2] Pub. L. No. 94-283, § 112(2), 90 Stat. 494 (1976), formerly codified at 2 U.S.C. 441i (1976) (repealed).

[3] See Pub. L. No. 97-51, § 130(a), 95 Stat. 966 (1981); Pub. L. No. 98-63, § 908(b), 97 Stat. 337 (1983); Pub. L. No. 99-190, § 137, 99 Stat. 1323 (1985), formerly codified at 2 U.S.C. 31-1(b) (1988) (repealed).

[4] See *Report of the House Bipartisan Task Force on Ethics on H.R. 3660*, 101st Cong., 1st Sess. (Comm. Print 1989), *reprinted at* 135 Cong. Rec. 30,740, 30,744 (1989).

[5] See *Fairness for Our Public Servants: The Report of The 1989 Commission on Executive, Legislative and Judicial Salaries* 24 (Dec. 1988) (*Quadrennial Commission Report*) (J.A. 233); *To Serve with Honor: Report of the President's Commission on Federal Ethics Law Reform* 35-36 (Mar. 1989) (*Wilkey Commission Report*) (J.A. 252-254).

that public trust has been "threatened by the steady growth of th[e] practice" of receiving honoraria.[6] The President's Commission on Federal Ethics Law Reform—created to "review Federal ethics laws, Executive orders, and policies and * * * make recommendations to the President for legislative, administrative, and other reforms needed to ensure full public confidence in the integrity of all Federal public officials and employees" [7]—came to a similar conclusion. That commission, chaired by the Honorable Malcolm R. Wilkey, concluded that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor" and that "the current ailment [caused by accepting honoraria] is a serious one." [8]

Both commissions recommended legislation totally prohibiting the receipt of honoraria in all three branches. The Wilkey Commission stated that, "in the interest of alleviating abuses in the legislative branch and in applying equitable limitations across the government," it "joins the Quadrennial Commission in recommending the enactment of legislation to ban the receipt on honoraria by all officials and employees in all three branches of government." [9] The Wilkey Commission concluded that the ban must be a comprehensive one to achieve its purpose: "To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria

---

[6] *Quadrennial Commission Report* at 24 (J.A. 233).

[7] Exec. Order No. 12,668, 3 C.F.R. 210, 211 (1989 comp.).

[8] *Wilkey Commission Report* at 35-36 (J.A. 253-254).

[9] *Wilkey Commission Report* at 35-36 (J.A. 253-254); see *Quadrennial Commission Report* at 24 (J.A. 234).

necessarily needs to extend both to activities related to an individual's official duties and to other activities." [10]

2. In the Ethics Reform Act of 1989 (Reform Act), Pub. L. No. 101-194, 103 Stat. 1716—"a good part of [which] is based on the recommendations of the President's ethics commission" [11]—Congress amended the Ethics in Government Act of 1978 (Ethics Act) to provide that Members of Congress and officers and employees of the federal government "may not receive any honorarium while that individual is a Member, officer or employee." [12] Reform Act § 601(a), 103 Stat. 1760, codified at 5 U.S.C. App. 501(b) (Supp. IV 1992). The prohibition was made applicable to all officers or employees of the federal government except for Senators, senate staff, and "special Government employee[s]," as defined in 18 U.S.C. 202. Reform Act § 601(a), 103 Stat. 1761-1762, codified at 5 U.S.C. App. 505(1) and (2) (Supp. I 1989). The term "honorarium" was defined to mean

> a payment of money or any thing of value for an appearance, speech or article by a Member,

---

[10] *Wilkey Commission Report* at 36 (J.A. 254).

[11] 135 Cong. Rec. H8747-H8748 (daily ed. Nov. 16, 1989) (remarks of Rep. Martin). See also S. Rep. No. 29, 102d Cong., 1st Sess. 3 (1991) ("Many provisions of the Ethics Reform Act, including the honoraria ban, were based on the recommendations of the President's Commission on Federal Ethics Law Reform. That Commission supported an absolute ban on honoraria for all Government Officers and employees.") (footnote omitted).

[12] Congress also provided that if an honorarium up to $2,000 is paid on behalf of the official to a qualifying charitable organization, it shall not be deemed to be received by the official. 5 U.S.C. App. 501(c) (Supp. IV 1992).

> officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *.

Reform Act § 601(a), 103 Stat. 1762, codified at 5 U.S.C. App. 505(3) (Supp. I 1989).

In 1991, Congress amended Section 505 by extending the prohibition against the receipt of honoraria to the Senate and its staff. Congressional Operations Appropriations Act, 1992, Pub. L. No. 102-90, Tit. I, § 6(b)(2), 105 Stat. 450 (1991). Congress also amended the definition of honorarium to deal specifically with a series of appearances, speeches, or articles. Legislative Branch Appropriations Act, 1992, Pub. L. No. 102-90, § 314(b), 105 Stat. 469 (1991). The definition, as amended, now reads:

> The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *.

5 U.S.C. App. 505(3) (Supp. IV 1992).

With respect to Executive Branch officers and employees, the honorarium ban is administered by designated agency ethics officers. 5 U.S.C. App. 503(2) (Supp. IV 1992). The ban is enforceable through an action brought by the Attorney General seeking a civil penalty of not more than $10,000 or the amount of prohibited compensation received, whichever is greater. 5 U.S.C. App. 504(a) (Supp. IV 1992). If, however, an individual has received an advisory

opinion from the Office of Government Ethics (OGE) or a designated ethics entity and acts in good faith in accordance with the opinion, that individual is not subject to the civil sanction authorized by the Act. 5 U.S.C. App. 504(b) (Supp. IV 1992).

As the Ethics Act specifically authorizes, see 5 U.S.C. App. 503(2) (Supp. IV 1992), OGE has promulgated rules and regulations to implement the Act. 5 C.F.R. 2636.201 *et seq.* The regulations make clear that Section 501(b) does not prevent federal employees from accepting reimbursement for a wide variety of expenses associated with giving speeches, producing articles, or making appearances. 5 C.F.R. 2636.203(a). The regulations also provide that the ban on honoraria does not reach compensation for teaching a course involving multiple presentations at accredited programs or institutions. 5 C.F.R. 2636.203(a)(8) and (9). "Appearance" is defined to exclude "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 5 C.F.R. 2636.203(b). "Speech" does not include the "recitation of scripted material, as for a live or recorded theatrical production," nor does it include the "conduct of worship services or religious ceremonies." 5 C.F.R. 2636.203(c). And "[a]rticle" does not include "works of fiction, poetry, lyrics, or script." 5 C.F.R. 2636.203(d).

B. The Current Controversy

1. Section 501(b) was enacted into law on November 30, 1989, and was to take effect on January 1, 1991. Reform Act § 603, 103 Stat. 1763. In late 1990, before the provision went into effect, several Executive Branch employees and unions that represent them commenced actions challenging the ban in

the United States District Court for the District of Columbia.[13] The actions claimed that the honorarium ban violates the First Amendment and requested an injunction against its enforcement.[14] Pet. App. 3a, 60a-61a; J.A. 1-35. The district court consolidated the actions, certified a class of all federal employees in the Executive Branch below grade GS-16 who would receive honoraria but for the prohibition contained in Section 501(b), and granted summary judgment in favor of the plaintiffs. Pet. App. 3a, 60a, 78a.

The court ruled that Section 501(b) violates the First Amendment rights of Executive Branch employees because it is "over-inclusive" in prohibiting the receipt of honoraria for expressive activities despite the absence of a relationship between the subject matter of the expression and the employee's federal employment or the identity or motives of the payor. Pet. App. 73a. The court also ruled that the

[13] As the district court noted, the individual plaintiffs are "currently employed full-time" in executive departments and agencies and include "a Nuclear Regulatory Commission lawyer who writes on Russian history (Crane); a Voice of America editor whose many published articles are generally on matters of international economics (Deutsch); a microbiologist at the Food and Drug Administration who reviews dance performances for print and broadcast media (Jackson); * * * and a civilian electronics technician for the U.S. Navy and a spare-time scholar/author on ironclad vessel technology of Civil War vintage (Putnam)." Pet. App. 60a, 61a n.1.

[14] Respondents also requested a preliminary injunction. The district court denied that relief, and its denial was upheld on appeal. *National Treasury Employees Union* v. *United States*, 927 F.2d 1253 (D.C. Cir. 1991).

provision is constitutionally "under-inclusive" because it permits artists or performers to receive compensation while barring similar payments to speechmakers and essayists. *Ibid.* As relief, the court struck down the honorarium ban in its entirety as applied to Executive Branch employees, but left the ban intact as applied to officers and employees in the Legislative and Judicial Branches.[15] *Id.* at 73a-78a.

2. A divided court of appeals affirmed. Pet. App. 1a-58a. Applying *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), the majority concluded that Section 501(b) violates the First Amendment rights of federal employees, because the honorarium ban is not "narrowly tailored." Pet. App. 14a. The court noted that Section 501(b) prohibits honoraria even when there is no "nexus between the employee's job and either the subject matter of the expression or the character of the payor." *Id.* at 9a. It concluded that, absent such a nexus, the receipt of honoraria would create neither actual impropriety nor the appearance of impropriety on the part of federal employees. *Ibid.* The court also concluded that Congress's across-the-board ban on the receipt of honoraria by Executive Branch employees could not be justified as a prophylactic measure to prevent abuses or to avoid the administrative burdens that would arise in determining whether particular compensated speech has a nexus to federal employment. *Id.* at 11a-14a.

[15] The district court enjoined the government from enforcing the ban, but stayed its judgment and permanent injunction "pending completion of proceedings on any timely appeal." Pet. App. 78a.

Having held that Section 501(b) has an unconstitutional "excess sweep," the court of appeals turned to the issue of remedy. Pet. App. 14a. The court recognized that it should "refrain from invalidating more of the statute than is necessary." *Ibid.* (citation omitted). Nevertheless, the court concluded that Section 501(b) must fall in its entirety as applied to Executive Branch employees because the provision "does not seem to admit of any construction that would trim off all or even most of the invalid applications to executive branch employees." Pet. App. 14a. The court stated that "[a]rticulation of some appropriate nexus test" to limit Section 501(b) to constitutional scope "would seem a purely legislative act." *Ibid.*

The court of appeals found, however, that the application of the honorarium ban to the Legislative and Judicial Branches could be saved. Pet. App. 14a-15a. The court noted that respondents had not argued that the honorarium ban is unconstitutional as applied to congressional or judicial officers and employees and that such a claim would implicate different considerations. *Ibid.* The court also concluded that Congress "clearly would have gone forward [with Section 501(b)] as to the legislative branch and in all probability as to the judicial [branch]," even if Congress had known of the provision's "unconstitutionality as applied to executive branch employees." *Id.* at 15a. Applying severability principles, the court therefore left Section 501(b) in force as applied to the Legislative and Judicial Branches. *Id.* at 17a-18a.

Judge Sentelle filed a lengthy dissent. Pet. App. 20a-58a. He argued that the majority had erred in evaluating the facial constitutionality of Section

501(b), rather than considering the case simply as a challenge to the honorarium ban as applied to the plaintiffs. He also contended, on the merits, that the flat ban on honoraria is justified by the government interest in avoiding the appearance of impropriety on the part of Executive Branch employees, and by the government interest in devising an administrable prohibition. Finally, he believed that the majority had erred in determining which applications of the statute to sever.[18]

Over the dissent of two judges, the court of appeals denied the government's request for rehearing and rehearing en banc. Pet. App. 79a, 80a-81a.

SUMMARY OF ARGUMENT

I. The honorarium ban is consistent with the requirements of the First Amendment. When Congress regulates speech by federal employees, the Constitution requires that the employees' interest in free expression be weighed against the government's interest in effectively carrying out the public tasks committed to its care. Under that test, Congress has latitude to impose restraints on employees where the regulated conduct may reasonably be thought to threaten the efficiency of government operations.

---

[18] Judge Sentelle argued that "the majority's severance in this case is nothing less than judicial legislation." Pet. App. 54a (internal quotation marks omitted). He maintained that the majority had inserted "words of limitation" into the statute in order to confine its ruling to the Executive Branch, *ibid.*; in his view, the majority's analysis should have led it to strike the phrase "'officer or employee' in its entirety from the statute, leaving the honorarium ban in place only as to Members of Congress." *Id.* at 57a.

In this case, the burden placed on federal employees in the Executive Branch by the honorarium ban is modest. The ban does not prevent or punish speech of any kind; rather it bans only the receipt of payment for employee speech. The limited detriment imposed by this sort of limitation on the outside earnings of federal employees is outweighed by the government's legitimate interests. The ban serves to promote the integrity and the appearance of integrity of the federal workforce; it prevents the evasion that a more limited rule might permit; and it avoids the enforcement problems that would be presented by a more permeable and nuanced ban.

The court of appeals invalidated the ban because it prohibits honoraria even when the expression is unrelated to federal employment and the payment is received from parties with no interest in currying favor with the employee. In doing so, the court incorrectly declined to apply this Court's cases upholding prophylactic regulations of employee speech, relied instead on inapplicable cases dealing with fully protected private speech, and improperly refused to credit Congress's judgment that a government-wide flat ban was required to prevent abuses. The court's nondeferential level of review and the conclusions it reached were erroneous.

II. Even if the court of appeals were correct in holding that the honorarium ban violates the First Amendment rights of Executive Branch employees to some extent because it prohibits honoraria even where there is no demonstrable connection to federal employment, the court's remedy was overbroad. The court struck down the honorarium ban with respect to all payments to Executive Branch employees, even though the court conceded that the ban could constitutionally

be applied when a nexus to federal employment exists. This Court, however, has made clear that a court should invalidate no more of an unconstitutional law than is necessary. In this case, that principle would require that the honorarium ban be invalidated only to the extent that the government fails to show a nexus to federal employment, based on either the character of the speech or the identity of the payor. Such a remedy would afford full relief to the plaintiffs for the conduct found to be constitutionally protected, while leaving the government free to enforce the ban against honoraria where such a nexus can be established.

ARGUMENT

THE COURT OF APPEALS ERRED IN FACIALLY INVALIDATING THE HONORARIUM BAN

I. THE HONORARIUM BAN DOES NOT VIOLATE THE FIRST AMENDMENT

Regulations that impinge on the speech of government employees are judged under a First Amendment test that requires a court to weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968); see *Connick* v. *Myers*, 461 U.S. 138, 142 (1983). This test permits the government to impose restrictions on expressive activity by public employees that would be unconstitutional in other settings. *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). The use

of such a balancing test reflects the recognition that the government, when it acts as an employer, "has far broader powers than does the government as sovereign," because of "the nature of the government's mission as employer." *Waters* v. *Churchill*, No. 92-1450 (May 31, 1994), slip op. 9, 12 (plurality opinion).

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

Id. at 12 (plurality opinion).

To give sufficient latitude to government officials to operate the machinery of government effectively, the Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters* v. *Churchill*, *supra*, slip op. 10 (plurality opinion). Congress may thus impose restraints on employees, without violating the First Amendment, as long as the conduct in question may be "reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947). Taking into account the character of the restriction imposed by the honorarium ban and the nature and magnitude of the government interests that support it, the ban is constitutional.

A. The Expressive Interests Of Employees Are Minimally Impaired By The Honorarium Ban

The initial step in evaluating the honorarium ban under the First Amendment is to consider its impact on employee expression. Section 501(b) does not prohibit or punish any speech, or discriminate based on subject or viewpoint. Rather, it prohibits only the receipt of money or other compensation for speech by those who have accepted the responsibility of federal employment (and who are paid for doing so). The First Amendment is implicated, therefore, only to the extent that speakers will be less willing to engage in expressive activity because they cannot supplement their federal salaries by receiving honoraria. While removing a financial incentive to engage in expression does trigger First Amendment concern, see *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the character of the restriction in Section 501(b) is far less onerous than a ban on expression, and the restriction consequently has less weight in the *Pickering* balance.[17]

---

[17] This Court's previous cases considering First Amendment protection for employee speech (*e.g.*, *Pickering*, *Connick*, *Waters*) have all involved direct sanctions placed on speech (such as termination) for statements with particular content; none has involved the lesser restraint of barring payment for speech. The court of appeals acknowledged the reduced weight of the employees' interest in this case. Pet. App. 5a (the "financial burden on speech" in this case creates a "First Amendment interest" that is "somewhat less weighty than under a flat ban").

In cases involving sanctions placed on employee speech because of its content, the Court has declined to accord First Amendment protection to speech that is entirely on matters of private, rather than public, concern. See *Waters*, *supra*,

Indeed, not only does the statute leave employees completely free to speak on any topic, but under Section 501(b)'s implementing regulations, the ban leaves room for a variety of forms of compensated expression deemed not to implicate Congress's concern about the actuality or appearance of impropriety. Employees thus are not barred from receiving compensation for teaching courses involving multiple presentations at accredited programs or institutions, 5 C.F.R. 2636.203(a)(8) and (9); for engaging in "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display," 5 C.F.R. 2636.-203(b); for reciting "scripted material, as for a live or recorded theatrical production," 5 C.F.R. 2636.-203(c); or for writing a "book or a chapter of a book" or "works of fiction, poetry, lyrics, or script," 5 C.F.R. 2636.203(d). Nor does the honorarium ban preclude reimbursement for many of the usual and customary expenses incurred in producing writings, or making speeches or appearances.[18] 5 C.F.R. 2636.203(a)(4) and (5).

---

slip op. 11. That distinction does not appear to be important under the honorarium ban (which does not focus on the specific content of employee speech), and we assume that respondents' speech has some First Amendment protection whether or not it is on a matter of public concern.

[18] See *National Treasury Employees Union* v. *United States*, 927 F.2d 1253, 1255 (D.C. Cir. 1991) ("The Act and the OGE regulations expressly exclude 'actual and necessary travel expenses' from the definition of an honorarium. * * * The regulations also exclude from the honoraria ban '[a]ctual expenses in the nature of typing, editing and reproduction costs,' and '[m]eals or other incidents of attendance, such as waiver of attendance fees or course materials furnished as

The honorarium ban prevents the receipt of compensation for individual appearances, speeches, and articles. Some federal employees will undoubtedly choose not to engage in one or more of those activities because they cannot be paid for doing so. That effect on the employees cannot be considered a severe burden. The employees covered by the honorarium ban are on the federal payroll and are therefore not likely in most cases to be financially dependent on outside earnings from expressive activity. And "to the extent that [employees] may be financially dependent on honoraria, the weight of the government interest in avoiding the appearance of impropriety or corruption [from the receipt of those payments] is greatly bolstered." Pet. App. 34a (Sentelle, J., dissenting).

The restriction on the receipt of honoraria thus places, at most, a relatively modest burden on employee speech. Even when the government directly punishes employee speech (by, for example, terminating the employee's employment), the government is not required to show that its action is "narrowly tailored to [serve] a compelling government interest." See *Waters* v. *Churchill*, *supra*, slip op. 12 (plurality opinion). When the only restriction imposed is a content-neutral one on the receipt of extracurricular income, the burden of justification on the government is not an especially heavy one.

B. The Government Has Significant Interests In Banning The Receipt Of Honoraria

The honorarium ban is supported by several significant government interests. First, the ban on this

---

part of the event at which an appearance or speech is made.' Fairly read, these provisions encompass all of the necessary expenses that the [employees] incur.") (citations omitted).

form of outside income promotes the integrity and appearance of integrity of the federal workforce. Second, the ban serves as a prophylactic measure that resists attempts at evasion. Third, the ban serves goals of administrative efficiency. Those interests readily justify Section 501(b)'s restriction on the ability of government employees to receive income from speech-related activity.

1. Congress has a compelling interest in preventing actual or apparent impropriety by government employees. The citizenry must have confidence that the personnel responsible for the public's business are not subject to improper influence by private special interests. "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is * * * critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley* v. *Valeo*, 424 U.S. 1, 27 (1976) (per curiam), quoting *CSC* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); see also *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 789 (1978); *Ex parte Curtis*, 106 U.S. 371, 373 (1882). Accordingly, it is consistent with the First Amendment for Congress to take strong measures to protect the integrity and the appearance of integrity of the federal workforce, so long as the behavior it seeks to regulate may be "reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers* v. *Mitchell*, 330 U.S. at 101 (upholding the Hatch Act); *CSC* v. *National Ass'n of Letter Carriers*, 413 U.S. at 564-567 (same); *Brown* v. *Glines*, 444 U.S. 348, 356 n.13 (1980).

The payment of money to federal government employees for the activities covered by the honorarium

ban can involve actual corruption; more importantly, it can readily convey an appearance to the public that influential access to government officials can be purchased by outside interest groups. Members of the public may have the impression that when a government employee is paid for his articles or speeches —even on topics ostensibly unrelated to the employee's duties—the receipt of the payment constitutes an abuse of government authority or a means for private interests to influence official action. Such a belief seriously undermines citizens' confidence in government. Honoraria had long been subject to congressional regulation precisely because of the ease with which officials may engage in ostensibly legitimate activities—giving a speech, writing an article, or making an appearance—when in fact little or no real effort was required on the official's part, and the payment was made principally because of the official's status. While other means of channeling money to officials with the goal of buying influence could pose similar risks, honoraria had emerged as a widespread practice that raised special concerns.

Congress experimented with various financial limitations and caps on honoraria, but it ultimately received the views of two distinguished commissions that such limitations were inadequate. See pages 2-5, *supra*. The Wilkey Commission, in reporting on federal ethics reform, found "no justification for perpetuating the current system of honoraria." *Wilkey Commission Report* at 35 (J.A. 253). The Commission explained that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor." *Ibid.* And the Quadrennial Commission endorsed the testimony of present and former congressional leaders and citizens' organi-

zations that the "potential for impropriety" in the present rules governing honoraria [is] so high that the practice of receiving honoraria should be eliminated." *Quadrennial Commission Report* at 24 (J.A. 233). While both commissions discussed past abuses of the practice of receiving honoraria with reference to "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group," the commissions also agreed that a broader statutory definition of honoraria was required, in order to close "present and potential loopholes." *Wilkey Commission Report* at 35, 36 (J.A. 253, 254); *Quadrennial Commission Report* at 24 (J.A. 232, 234).

2. The second interest supporting a broad ban on honoraria is the interest in avoiding the risk that a narrower limitation could be evaded. While some forms of compensated speech by federal employees, before some audiences, may seem sufficiently unrelated to federal employment as to raise no concern, apparently innocuous payments could be made for improper purposes. Indeed, the Wilkey Commission made this exact point: "To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities." *Wilkey Commission Report* at 36 (J.A. 254).

3. Finally, the government has an interest in avoiding the administrative difficulties that would attach to any rule requiring a substantial number of case-by-case judgments about the appropriateness of particular honoraria. "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate in-

terest when it acts as sovereign to a significant one when it acts as employer." *Waters* v. *Churchill*, *supra*, slip op. 12 (plurality opinion). While efficiency concerns would not ordinarily justify limitations on the First Amendment rights of "the public at large[,] * * * where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Id.* at 12-13 (plurality opinion).

Officials might often encounter significant difficulty in determining whether an appearance of impropriety is threatened by particular individual honoraria payments, and the administrative costs of such particularized review could be substantial. Congress would be required either (1) to staff a centralized federal ethics office with the capacity to pass on the proposed appearances, speeches, or articles of the entire federal workforce, or (2) to delegate to officials in different agencies the task of reviewing individual honoraria payments to determine whether a prohibited relationship to federal employment exists. The first approach might not only be expensive and inefficient, it would also run the risk that a central ethics official would be unaware of the details of a particular agency's range of business and might therefore overlook the impropriety or appearance of impropriety raised by particular honoraria. The second approach, involving decentralized administration, could give rise to disparate interpretations of the law, as each agency formed its own view about what constitutes appropriate honoraria payments. A government-wide flat ban on honoraria for individual appearances, speeches, and articles reduces those difficulties.[19]

---

[19] The Ethics Act does provide for designated ethics officials in each covered agency to render advisory opinions to

The difficulties of a more limited ban on honoraria administered by individual agencies are made clear by a 1992 report by the General Accounting Office (*GAO Report*).[20] The GAO examined outside activities of federal employees from 1988 to 1990 (before the honorarium ban) that could create an appearance of a conflict of interest. Following a study of ethics enforcement by 11 agencies, the GAO found that the most commonly approved outside activities were speaking and consulting. Even though standards were in place intended to screen out activities that raised conflicts of interest or that would appear to do so, some agencies exhibited "overly permissive policies and practices." *GAO Report* at 9. The GAO also found that OGE was unable to ensure that the rules were enforced effectively and uniformly. *Id.* at 2, 12-13. The GAO concluded that some agencies had thereby "approved activities that

---

employees interpreting the honorarium ban as applied to particular facts. 5 U.S.C. App. 504(b) (Supp. IV 1992). The issue that is determined in such advisory opinions, however, is not whether the particular content of an employee's individual appearance, speech, or article, or the payor of the employee's fee, raises concerns about actual or apparent impropriety. Rather, it is whether the categorical type of expression in question is covered by the honorarium ban and its implementing regulations. That task is a far more manageable one. So too is the task of applying the more limited scope of the honorarium ban that Congress applied to a "series" of appearances, speeches, or articles. See note 26, *infra*, and accompanying text.

[20] See GAO Report to the Chairman, Subcomm. on Federal Services, Post Office and Civil Service of the Senate Comm. on Governmental Affairs, *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues* (Feb. 1992), *reprinted at* Common Cause Amicus Br. App. A (filed Mar. 24, 1994).

were questionable as to the appropriateness of accepting compensation" from non-governmental sources. *Id.* at 9. While the GAO Report was not before Congress when it enacted Section 501(b), its findings give credence to Congress's decision to avoid the risk that patchwork enforcement of a limited honorarium ban might produce some of the very appearances of impropriety that Section 501(b) sought to overcome.

In sum, the prohibition on the receipt of honoraria —regardless of the content of an individual appearance, speech, or article, and regardless of the identity of the person paying the fee to the federal employee —furthers important government interests that would be compromised were the ban less comprehensive. In the *Pickering* balance, those interests outweigh the limited financial burden placed on federal employees and make the ban a reasonable one, consistent with the requirements of the First Amendment.

C. The Court Of Appeals Erred In Analyzing The Constitutionality Of The Honorarium Ban

In invalidating the honorarium ban, the court of appeals held that the government has an interest in regulating honoraria payments only if a "nexus" exists between the employee's expression and either the nature of his employment or the identity of the payor. Pet. App. 9a. The court then found that restriction of honoraria payments, when such a nexus does not exist, burdens speech without an adequate justification. That conclusion rests on two interrelated analytical errors. First, the court erred by disagreeing with Congress about the kinds of harms that could be deemed to arise from the receipt of honoraria, even when no nexus to employment can

be identified. Second, the court erred by demanding concrete evidence of abuses under the prior administrative scheme in order for Congress to enact a broad prophylactic ban.[21]

1. In striking down the honorarium ban, the court of appeals recognized that "the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria." Pet. App. 6a. The court further noted that it could "safely assume * * * that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensation *where the compensation creates such an appearance.*" *Ibid.* The court concluded, however, that the practice of receiving honoraria poses problems that justify a ban only when there is a "nexus between the employee's job and either the subject matter of the expression or the character of the payor"; only then is there "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." *Id.* at 9a.

Congress, however, could have reasonably deemed honoraria to pose a threat to the public's perception of the integrity of the federal workforce, whether or not a specific nexus can be shown. *United Public Workers* v. *Mitchell*, 330 U.S. at 101. The public is not likely to be aware of the full range of responsibilities of a particular employee, or whether the payor of the honorarium has a specific interest in a matter pending before the employee's agency. Virtually any payment for employee speech could therefore trigger citizen concern. The interest in reducing suspicion about the cause or effect of a particular honorarium supports a flat ban, with no grey areas.

While it may be that some lower-echelon employees have such modest responsibilities that the public would not ordinarily assume that an honorarium for unrelated speech involves the possibility of impropriety, the question is necessarily one of degree. Even the court of appeals seemed willing to acknowledge that the receipt of honoraria by a GS-7 "tax examining assistant" (J.A. 67) could stimulate citizen concern, "[i]n view of the universality of citizens' subjection to the Internal Revenue Service." Pet. App. 10a. Yet many career federal employees wield extensive authority over citizens in particular settings.

[21] The court of appeals engaged in an extensive analysis of the precise degree of "tailoring" that is required of a government regulation of the speech of public employees. Pet. App. 6a-8a. This Court's decisions, however, have never articulated an independent "narrow tailoring" requirement applicable to regulations of employee speech, and it would be unwise to apply in this context the narrow tailoring test designed to judge regulations of speech of the public at large. "The breadth * * * of the governmental restriction is of course *relevant* to the *Pickering* analysis," because "[w]hen the government burdens substantially more speech than 'required' by its asserted interest, then its asserted interest might not outweigh that greater burden." Pet. App. 103a (Silberman, J., dissenting from the denial of rehearing en banc). But a rigid "narrow tailoring" requirement is inappropriate under *Pickering*, because the degree of tailoring that is required will vary depending on the nature of the burden on employees and the strength of the government interests at stake. Here, for example, a more lenient degree of tailoring should be demanded, since the only burden on employees is a restriction on outside income derived from speech, and the government interest in strengthening citizen confidence in the integrity of the federal workforce is a compelling one.

For example, employees in law enforcement agencies, inspectors of agricultural goods, bank examiners, and procurement officials in all departments have significant control over matters of importance to citizens. Opinions may differ about precisely which employees must be subject to the most rigorous ethical rules in order to prevent issues of apparent impropriety from surfacing. In these circumstances, Congress elected to close potential loopholes and to impose a uniform set of rules. The court of appeals erred by substituting its judgment for Congress's on this issue.[22]

2. In *United Public Workers* v. *Mitchell*, *supra*, this Court rejected a claim, analogous to that accepted by the court of appeals, that Congress had swept too broadly in covering all federal employees under the Hatch Act. In holding that Congress could seek to eradicate the problems caused by partisan political activity in the federal service, the Court relied on Congress's appraisal of the potential dangers. Thus, the Court rejected the argument that

[22] In *Buckley* v. *Valeo*, 424 U.S. 1, 82 (1976) (per curiam), this Court upheld federal campaign laws against an overbreadth challenge based on the theory that the "monetary thresholds in the record-keeping and reporting provisions lack a substantial nexus with the claimed governmental interests, for the amounts involved are too low even to attract the attention of the candidate, much less have a corrupting influence." While recognizing that the "thresholds are indeed low," *id.* at 83, the Court held that "[t]he line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." *Ibid.* Because that rationale satisfied the "strict scrutiny" applied to fully protected political speech in *Buckley*, 424 U.S. at 75, it is also sufficient in the context of the reduced First Amendment level of scrutiny applicable here.

a lower-rung employee, such as a roller in the mint, could not be covered by the ban on partisan political activity, because Congress "may have concluded" that advancement in government service could come to depend on participating in politics and "may have thought" that government employees could usefully be conscripted into a political machine. 330 U.S. at 101. And the Court rejected the claim that "industrial" rather than "administrative" employees could not be covered by the Hatch Act, viewing such distinctions in types of employees to be "differences in detail" that were for Congress to determine. *Id.* at 102. In *CSC* v. *National Ass'n of Letter Carriers*, 413 U.S. at 564-567, the Court, with the *Pickering* balancing test in mind, reaffirmed its conclusion that the broad prophylactic approach of the Hatch Act does not violate the First Amendment. The analysis in the Hatch Act cases cannot be squared with the court of appeals' holding here.

Section 501(b) is a far milder prophylactic rule than the rule upheld in *Mitchell* and *CSC*. The Hatch Act barred most federal employees from taking "any active part in political management or in political campaigns." *Mitchell*, 330 U.S. at 78. The Act thus sharply limited political rights that lie at the heart of the First Amendment. See *Connick* v. *Myers*, 461 U.S. at 145. This case, in contrast, does not involve any direct limitation on political speech, and does not prohibit any speech or activity from taking place. Rather, it prohibits only the receipt of financial rewards above and beyond the expenses incurred by the employee. If anything, therefore, greater deference is owed to Congress's broad ban on honoraria in this case than to its ban of partisan politics in the Hatch Act.

The court of appeals dismissed the Hatch Act cases on the basis that the Hatch Act addressed a threat of subtle pressure to engage in partisan political activity, such that "it is in the nature of the evil to be averted that it will be concealed." Pet. App. 13a. In that setting, the court believed that no concrete examples of abuse would be expected to surface and that this justified relieving Congress of the burden to point to a record of prior abuses. *Ibid.* For three reasons, the court of appeals erred in refusing to apply the test articulated in *Mitchell*.

First, this Court has never said that *Mitchell*'s test is limited to legislative remedies for subtle forms of abuse. The Court gave Congress a freer hand to regulate the speech of employees than it has to regulate the speech of the citizenry at large because of the special interests that the government has as employer. *Mitchell*'s deferential approach was not fashioned specifically because of a belief that the problem of coercion of employees to engage in partisan politics could easily be concealed.

Second, whenever Congress is imposing a regulatory net in part to prevent corruption, as in this case, it is likely that prior corrupt activity would have been concealed and that its specific effects may be hard to discern. If it is difficult to determine whether employees have been covertly influenced to engage in partisan politics, it is also difficult to determine the extent to which public confidence in government may be eroded because of actual or perceived impropriety in the receipt of honoraria. In either case, the primary body to make the relevant judgment is Congress.

Third, Congress did have before it evidence of significant abuse of honoraria—in the Legislative

Branch. Congress was entitled to extrapolate from its own experience and to conclude that comparable abuses could also occur in the other branches of government. And, while public perception of abuses of honoraria may be more likely at the upper reaches of the Executive Branch, Congress was within its discretion in applying the honorarium ban to all employees where the potential for abuse exists—just as Congress did in the Hatch Act, see *Mitchell*, 330 U.S. at 101, and just as it has done with a panoply of anti-corruption laws that are applicable to all Executive Branch employees, from clerks to cabinet officers.[23] See also *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990).

As a plurality of the Court noted in *Waters* v. *Churchill*, *supra*, slip op. 10, in evaluating "government predictions of harm used to justify restrictions of employee speech," the Court has not insisted on "tangible, present interference with the agency's operation." Rather, the "danger[s]" found sufficient by the Court have been "mostly speculative." *Ibid.* Indeed, "[o]ne could make a respectable argument that political activity by government employees is generally not harmful," *ibid.*, but this Court has nevertheless upheld Congress's broad Hatch Act prohibitions. There is no reason for a different conclusion here with respect to the honorarium ban.[24]

---

[23] See, *e.g.*, 18 U.S.C. 201(b) and (c) (prohibiting solicitation or receipt of bribes or illegal gratuities); 18 U.S.C. 209 (prohibiting receipt of compensation for government service or a supplementation of salary from a private party).

[24] Congress remains free "to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First

3. Rather than applying the deferential approach reflected in this Court's cases dealing with the First Amendment rights of public employees, the court of appeals took its guidance from cases construing the First Amendment in the context of fully protected private speech. In rejecting the claim that the honorarium ban is a legitimate prophylactic measure, the court of appeals stated that "a mere 'hypothetical possibility' of a corrupt 'exchange of political favors' is not enough" to support the law; actual evidence of abuse is required. Pet. App. 12a. In support of that test, the court of appeals quoted from *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 498 (1985), and cited *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 789 (1978). Pet. App. 12a-13a. Both of those cases, however, examined fully protected political speech by private persons.[25] They did not involve speech by govern-

Amendment, values central to our social order as well as our legal system." *Waters* v. *Churchill, supra*, slip op. 11-12. Congress has accordingly recently relaxed some of the restrictions formerly imposed by the Hatch Act. See Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001. Somewhat similarly, Congress recently enacted a limited exception to the honorarium ban for certain scholarly writings by students and most teachers at military academies. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 542, 106 Stat. 2413-2414 (1992).

[25] *FEC* v. *National Conservative Political Action Committee*, 470 U.S. at 491, considered a provision making it a crime for an independent political action committee to spend more than $1,000 in support of a presidential candidate who accepted federal funding. The Court made clear that "the expenditures at issue in this case produce speech at the core of the First Amendment," and are "entitled to full First Amendment protection." *Id.* at 493, 496. *First National Bank of*

ment employees, the regulation of which is judged under the more lenient *Pickering* balancing test. In the latter context Congress's appraisal of dangers to the efficiency and integrity of the federal workforce is given far greater judicial deference, even if the courts may deem those dangers to be "speculative." *Waters* v. *Churchill, supra*, slip op. 10 (plurality opinion).

4. Because it applied an incorrect legal test, the court of appeals improperly found fault with Section 501(b), based on the absence of concrete evidence of administrative problems associated with prior experience with a nexus test. Pet. App. 11a. None of the specific ways in which the court demanded evidence of enforcement or administrative costs, however, forms a permissible basis for invalidating Section 501(b).

The court first observed that the government did not identify "any serious enforcement or line-drawing costs associated" with the pre-Section 501(b) scheme for regulating honoraria, which (as reflected in the government's interpretation of conflict-of-interest statutes, rules, and executive orders) involved a form of nexus test. Pet. App. 11a; see J.A. 179. As discussed above, however, Congress was not required to wait until harms actually materialized in the Executive and Judicial Branches before eliminating a practice that had already caused serious con-

Boston v. *Bellotti*, 435 U.S. at 767, involved a state criminal law prohibiting corporations from making expenditures to influence referenda. The Court described the prohibited speech as lying "at the heart of the First Amendment's protection," and subjected the prohibition to strict scrutiny. *Id.* at 776, 786.

cern in the Legislative Branch. Even if the practice of accepting honoraria had not yet grown to such proportions in the Executive or Judicial Branches as to impair the reputation for integrity of those institutions, Congress, based on its own experience, could seek to prevent such damage from occurring.

In considering ethics reform legislation, individual Members of Congress concurred in the conclusion that the public had come to think that "the rise in congressional speaking fees is[] at best providing those special interests which can afford honoraria payments unfair access to Government officials and, at worst, institutionalizing a thinly veiled system of legalized influence buying." 135 Cong. Rec. H8766 (daily ed. Nov. 16, 1989) (remarks of Rep. Wolpe). As Senator Humphrey explained:

> This is a hardnosed town. People do not do nice things for you, just to be nice. When someone pays $1,000 just for a speech, it is not purely on the basis of altruistic motives. They are hoping, at the very least, the Senator will be somewhat more disposed toward their point of view, should some matter come up in the future which concerns them. That is what is wrong with honoraria.

Id. at S15952 (daily ed. Nov. 17, 1989). Even if most honoraria did not involve conflicts of interest, Senator Dole agreed with his colleagues that "we had better err on the side of caution" and that "to be on the safe side we should eliminate honoraria." *Id.* at S15948. That judgment, though articulated in the context of the Legislative Branch, could be thought to hold true for the other branches as well.

Second, the court erred in considering Section 501(b) itself to contain evidence that Congress

deems a nexus test to be sufficient to protect federal interests with respect to the receipt of honoraria. The court noted that Section 501(b) bans honoraria for a "*series* of appearances, speeches, or articles" only when "the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government." 5 U.S.C. App. 505(3) (Supp. IV 1992) (emphasis added). Congress's adoption of a nexus approach when a "series" is at issue, however, did not require it to extend the same approach to all honoraria payments. Rather than suggesting that Congress "regards [the nexus] lines [applicable to a series] as entirely workable" in all contexts, as the court of appeals suggested, Pet. App. 12a, the special rule for a "series" of appearances, speeches, or articles can be explained by the different administrative and enforcement issues that arise in that context.[26] Indeed,

---

[26] Several factors distinguish honoraria for a series of appearances, speeches, or articles from individual instances of expression for pay. First, Congress "might reasonably have concluded" that repeated paid appearances before a particular group are "likely to be more open and more visible to the public (or the public's watchdogs) than * * * a one-time payment for a single appearance," and that "corruption is less likely under such circumstances." Pet. App. 85a-86a (Williams, J., concurring in the denial of rehearing and rehearing en banc). Second, Congress may also have found that the larger volume of material likely to be involved in a "series" facilitates the judgment about whether a prohibited nexus exists. Third, because it is likely that relatively few employees engage in a "series" of paid appearances, speeches, or articles, requiring case-by-case review for nexus issues involving a series presents a far more manageable administrative task than if officials were required to reveiw *all* individual instances of compensated speech by federal employees.

the Wilkey Commission itself had suggested that ongoing relationships (characteristic of a series) raise lesser concerns than single-shot appearances, noting that "as we conceive of it, the bar on receipt of honoraria would not prohibit payment for continuing activities such as teaching academic, for-credit, courses." *Wilkey Commission Report* at 36 (J.A. 254); see also *Quadrennial Commission Report* at 30 (J.A. 242).

The court of appeals relied on *Boos* v. *Barry*, 485 U.S. 312, 324-329 (1988), in comparing the different components of Section 501(b) to each other to determine whether the honorarium ban for individual appearances, speeches, and articles is "narrowly tailored." Pet. App. 11a. *Boos*, however, compared a narrow restriction of speech recently enacted by Congress with a broad one enacted many years earlier, and concluded that in light of the more recent provisions the older law could not be deemed narrowly tailored to serve the governmental interests at stake. A comparison of that nature is not justified when Congress enacts roughly contemporaneous provisions intended to form complimentary rules in the same statutory scheme. The relevant baseline for evaluating the need for Section 501(b) is found in Congress's prior, limited, and ultimately unsuccessful effort to regulate honoraria. "[A] comparison of the honorarium ban to prior ethics laws unmistakably reveals a congressional determination that only a broad, government-wide ban on honoraria is sufficient to protect against the appearances of impropriety or corruption accepting honoraria creates." Pet. App. 43a (Sentelle, J., dissenting). Such "careful legislative adjustment" of the honoraria laws "in a cautious advance, step by step," to reflect Congress's evolving

sense that a flat ban was required "warrants considerable deference." *FEC* v. *National Right To Work Committee*, 459 U.S. 197, 209 (1982) (internal quotation marks omitted).

Under a standard that gives proper deference to Congress's appraisal of the risks of honoraria, Section 501(b) is constitutional. There may be differences of opinion about whether, as a policy matter, the honorarium ban reflects an excessive degree of caution. Some may have preferred that Congress had erred on the side of permitting honoraria when no apparent nexus is present, even if the price were to allow some troublesome payments to slip through the cracks. But Congress is entitled to considerable leeway in protecting the appearance of integrity of the federal workforce—particularly when the issue is not whether employees may enjoy free speech, but whether they may engage in paid speech.

II. THE COURT OF APPEALS' REMEDY IS TOO BROAD BECAUSE IT EXCEEDS THE SCOPE OF THE VIOLATION FOUND

Even if the court of appeals were correct in concluding that Section 501(b) has some unconstitutional applications, the court's remedy far exceeds the scope of the purported violation. The court acknowledged that "for some of § 501(b)'s applications —perhaps many of them—the *Pickering* balance supports its constitutionality." Pet. App. 6a. Yet the court of appeals invalidated Section 501(b) in *all* its applications to Executive Branch employees—even where the government could readily demonstrate the existence of "some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor." *Id.* at 9a.

The overbroad relief ordered by the court of appeals is unjustified.[27]

1. The principle that a statute should not be invalidated to a greater extent than is necessary finds expression in several lines of this Court's cases. First, under traditional principles of severability, "[w]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted); *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion); *INS* v. *Chadha*, 462 U.S. 919, 934 (1983); *Buckley* v. *Valeo*, 424 U.S. at 108; see *New York* v. *Ferber*, 458 U.S. 747, 769 n.24 (1982) (when a "federal statute * * * is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated"). The Court has explained that severance of the unconstitutional provision is required "unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.*, 480 U.S. at 685.

[27] The breadth of the court of appeals' judgment is underscored by the court's grant of relief in favor of *all* Executive Branch employees, even though the class consisted only of Executive Branch employees below grade GS-16. J.A. 124-125. Respondents did not argue that the honorarium ban was unconstitutional as to such senior executive officials, see Resp. C.A. Br. 36 n.21, and even the court of appeals may have reached a different outcome on the *Pickering* balance as to such officials, cf. Pet. App. 13a, yet its comprehensive ruling foreclosed that issue.

Second, the Court's decisions manifest a strong preference for addressing as-applied constitutional challenges to statutory provisions before adjudicating facial challenges that rely on overbreadth theory. See *Renne* v. *Geary*, 501 U.S. 312, 323-324 (1991); *Board of Trustees* v. *Fox*, 492 U.S. 469, 484-485 (1989). When a court proceeds in the recommended sequence and finds that a provision is unconstitutional as applied to the particular conduct alleged by the plaintiffs, it is normally unnecessary, and generally imprudent, to proceed to determine whether the provision would also be facially unconstitutional as applied to other parties and other conduct. *Renne*, 501 U.S. at 324; *Fox*, 492 U.S. at 485.

Third, overbreadth doctrine itself prohibits facial invalidation of a statute unless "the overbreadth of a statute [is] * * * not only * * * real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973); *New York* v. *Ferber*, 458 U.S. at 769-772; *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 502-503 & n.12 (1985). Where, as here, a statute has a concededly broad range of entirely permissible applications, a court should not reach out to strike down the statute on its face, when a narrower form of relief is available.

2. The court of appeals departed from those principles in affirming the district court's judgment. The court of appeals began by correctly noting that it should invalidate no more of Section 501(b) than is necessary to remedy the constitutional flaw it discovered. Pet. App. 14a. The court concluded, however, that it could not leave Section 501(b) in place as to applications in which the government *can* establish a nexus between the honoraria and government

employment, because "[a]rticulation of some appropriate nexus test would seem a purely legislative act." *Ibid.* That analysis is incorrect. The court of appeals itself crafted a "nexus test" as an integral element of its First Amendment inquiry; it held that because there is no required nexus in the statute, the prohibition is not narrowly tailored. *Id.* at 9a-14a. If the nexus concept serves to identify the *unconstitutional* applications of Section 501(b), as the court of appeals held, it also can serve to identify the *constitutional* applications of Section 501(b). The court expressed concern that if it had invalidated the honorarium ban only to the extent that it reaches honoraria where no nexus to employment is present, it would have intruded on Congress's prerogative to craft a specific nexus inquiry. Pet. App. 14a. Interpreting the Constitution to require a nexus to be shown, however, does not intrude on Congress's prerogatives. In addition, the statute itself contains a general nexus test with respect to a "series" of appearances, speeches, and articles, and that test would have readily furnished a suitable line for the court to invoke to implement its constitutional holding.[28]

[28] See 5 U.S.C. App. 505(3) (Supp. IV 1992) (prohibiting honoraria for a series of appearances, speeches, or articles when "the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government"). That test fits well within the court's requirement of a "nexus between the employee's job and either the subject matter of the expression or the character of the payor." Pet. App. 9a. Ironically, the court of appeals invalidated even the portion of the statute governing honoraria for a "series" of appearances, speeches, or articles, even though it is difficult to imagine under the court's own analysis how that provision has any potential unconstitutional application.

The court's essential error was its failure to craft a remedy that responded to the particular constitutional violation it found. A proper remedy, in light of that violation, would have redressed the honorarium ban's unconstitutionality *as applied* to speech lacking a nexus to federal employment.[29] This Court's First Amendment cases reflect that more restrained approach. For example, in *United States* v. *Grace*, 461 U.S. 171 (1983), the plaintiffs engaged in expressive activity on the sidewalk in front of the Supreme Court. Their conduct violated 40 U.S.C. 13k, which prohibited displays designed "to bring into public notice any party, organization, or movement" anywhere in the Supreme Court building or its grounds, defined to include the adjacent public sidewalk. Although the plaintiffs argued that the statute was facially invalid in all its applications, the Court declined to determine

[29] The central objection to the honorarium ban voiced in the complaints is that the ban prohibits "federal employees from receiving income from speeches, articles or appearances unrelated to their federal employment." NTEU Second Amended Complaint, ¶ 35 (J.A. 13); see AFGE Complaint, ¶ 20 (J.A. 20). And all of the specific honoraria that the ban was alleged to have improperly prohibited purported to be speech that was unrelated to federal employment. See NTEU Second Amended Complaint, ¶¶ 5, 6 (J.A. 5-6), 14-15 (J.A. 7-8); AFGE Complaint, ¶¶ 12-16 (J.A. 18-20); Crane *et al.* Amended Complaint, ¶¶ 4-12 (J.A. 26-30). But see Pet. App. 10a (noting that "some of the plaintiffs receive payments that might at least raise an eyebrow"). Accordingly, as Judge Silberman noted, "[a]ll that is needed to cure the constitutional infirmity is to relieve the ban on compensation from single speeches whose subject does not relate to the employee's job and when the status of the employee is not implicated." Pet. App. 105a (dissenting from the denial of rehearing en banc).

the validity of Section 13k as applied to the Supreme Court building and its immediate grounds. Rather, even though the statute on its face did not distinguish between public sidewalks and other places such as the interior of the Court, the Court concluded that the provision could not constitutionally "be applied to the public sidewalks" and struck down the statute only to that limited extent. 461 U.S. at 179.

More recently, in *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993), the Court considered a state prohibition against in-person solicitation of work by a certified public accountant. Although the ban contained no textual distinction between solicitation of commercial customers and solicitation of nonbusiness customers, the Court held that "as applied to CPA solicitation in the business context, [the State's] prohibition is inconsistent with the free speech guarantees of the First and Fourteenth Amendments." *Id.* at 1796. The Court thus treated "Fane's claim as an as applied challenge to a broad category of commercial solicitation," *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2706 (1993), and saw no need to invalidate applications that might well have been justified under the First Amendment. See also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. at 504 (holding that an obscenity statute was invalid "only insofar as the word 'lust' is to be understood as reaching protected materials"; declining to invalidate constitutionally permissible applications of the term "lust"). Under *Grace*, *Edenfield*, and *Brockett*, facial invalidation of the honorarium ban was inappropriate even if it was not possible to find a "limiting construction" of the statute. Pet. App. 14a. It would have been sufficient to declare the provision unenforceable as to its invalid applications.

This is not a case in which the court was justified in invalidating the entire honorarium ban on overbreadth grounds. Cf. *FEC* v. *National Conservative Political Action Committee*, 470 U.S. at 501. The honorarium ban has a substantial number of valid applications, and the court made no effort to determine what proportion of its applications might be invalid. See *Fox*, 492 U.S. at 485 (noting that such an inquiry is required in an overbreadth case). The court of appeals stated only that "the ban reaches a lot of compensation that has no nexus to government work" and speculated that "the scope of the invalid applications is large." Pet. App. 10a & n.4. Simultaneously, however, the court acknowledged that "perhaps many" applications of the honorarium ban are constitutional under "the *Pickering* balance," *id.* at 6a, and conceded that the ban "covers payments for speeches and articles that may well create [an] appearance of impropriety." *Id.* at 10a. Yet "[t]his Court has * * * repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied." *Parker* v. *Levy*, 417 U.S. 733, 760 (1974).

The purpose of the overbreadth doctrine is to protect against the chill imposed on protected speech by "a sweeping statute, or one incapable of limitation." *New York* v. *Ferber*, 458 U.S. at 772; *Broadrick* v. *Oklahoma*, 413 U.S. at 612; *Massachusetts* v. *Oakes*, 491 U.S. 576, 584 (1989) (plurality opinion) ("Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression."). Overbreadth doctrine is usually invoked to create an exception to the general rule of standing that a person

may assert a violation only of that person's constitutional rights; "the person invoking overbreadth may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him." *Fox*, 492 U.S. at 482-483 (internal quotation marks omitted); *Broadrick* v. *Oklahoma*, 413 U.S. at 610-612. Here, however, respondents do not assert that facial invalidation of the honorarium ban is necessary to protect against a chilling effect imposed on nonparties. Because the district court certified a class consisting of all federal employees below grade GS-16, it is questionable whether any potential plaintiffs not before the Court would be deterred from engaging in protected speech by the honorarium ban.

Nor is total invalidation of the honorarium ban necessary to relieve a chilling effect on respondents themselves. Respondents' rights would have been adequately protected if the court of appeals had held the ban unconstitutional as applied to honoraria where the government does not show a nexus to employment. Pursuant to the statute, employees desiring to receive honoraria can obtain advisory opinions interpreting the Act from designated ethics officials, and "[a]ny individual to whom such an advisory opinion is rendered * * * who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any sanction" under the honoraria law. 5 U.S.C. App. 504(b) (Supp. IV 1992); see also 5 C.F.R. 2636.103. In light of that procedure, an employee could obtain an advance determination of whether a particular honorarium would have a nexus to federal employment (as the

court thought was required by the First Amendment), without having to risk any penalty or sanction.[30]

The court, therefore, should have limited its decision to invalidating the application of Section 501(b) to cases in which there is no nexus between the speech for compensation and the employee's federal status, and left the remaining applications in force. There was no basis for invoking any form of "overbreadth" doctrine in this case, with the effect of invalidating clearly constitutional applications of the law. "[W]hatever overbreadth may exist should be cured through case-by-case analysis." *Broadrick* v. *Oklahoma*, 413 U.S. at 615-616; *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. at 503-507.

---

[30] The danger of chill is also reduced by the fact that the statutory remedy for a violation of the honorarium ban is not a criminal penalty; rather, a court may simply order disgorgement of an amount up to the amount of the compensation received or $10,000, whichever is greater. 5 U.S.C. App. 504(a) (Supp. IV 1992); see *Ferber*, 458 U.S. at 773 (noting that "the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

JOHN C. HOYLE
ALFRED MOLLIN
Attorneys

JUNE 1994

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 301157 86166